

UNITED STATES DEPARTMENT OF LABOR
Board of Alien Labor Certification Appeals
WASHINGTON, D.C.

Date: December 16, 1997

Case No: 96 INA 348

In the Matter of:

MOJDEH ZAFARANCHI, M.D.,
Employer,

On Behalf of:

ALI A.HOUSHYAR,
Alien

Appearance: J. G. Roche, Esq., of Santa Ana, California
for the Employer and the Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of ALI A.HOUSHYAR, Alien ("Alien"), filed by MOJDEH ZAFARANCHI, M.D., Employer ("Employer"), pursuant to § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U. S. Department of Labor at San Francisco, denied the application and the Employer requested review under 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able,

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.²

STATEMENT OF THE CASE

On October 12, 1993, the Employer filed an application for labor certification to enable the Alien, an Iranian national, to fill the position of Medical Technologist in the physicians office of the Employer in Canoga Park, California.³ The position was classified under Occupational Code No. 078.261-038 as Medical Technologist.⁴ The Employer described the position it offered as follows:

THE OCCUPANT OF THIS POSITION WILL BE REQUIRED TO CONDUCT SCIENTIFIC AND CHEMICAL RESEARCH FROM LABORATORY TEST OBTAINED FROM CHEMICAL, SEROLOGIC, HEMATOLOGIC, PARASITIS AND BACTERIOLOGIC SPECIMENS. IN ADDITION IT WILL BE NECESSARY TO DEVELOP THE RESEARCH INTO QUANTITATIVE AND QUALITATIVE ANALYSIS. IT WILL ALSO BE REQUIRED TO CORRDINATE RESEARCH RESULTS WITH OTHER DIAGNOSIC DATA PROVIDED TO THE OCCUPANT. THE OCCUPANT WILL REQUIRE

²Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

³The Alien graduated medical school in Iran with a medical degree in 1973. He took a residency in internal medicine at Yale University in New Haven, Connecticut, from 1990 to 1993, for which he received a certificate for his completion of a residency in internal medicine. AF 95. From 1984 to 1986 he was an Associate Professor at a School of Medicine in Iran. From 1987 to 1989 he was a Medical Technician at Harlem Hospital Center in New York.

⁴**078.261-038 MEDICAL TECHNOLOGIST** (medical ser.) Performs medical laboratory tests, procedures, experiments, and analyses to provide data for diagnosis, treatment, and prevention of disease: Conducts chemical analyses of body fluids, such as blood, urine, and spinal fluid, to determine presence of normal and abnormal components. Studies blood cells, their numbers, and morphology, using microscopic technique. Performs blood group, type, and compatibility tests for transfusion purposes. Analyzes test results and enters findings in computer. Engages in medical research under direction of MEDICAL TECHNOLOGIST, CHIEF (medical ser.) 078.161-010. May train and supervise students. May specialize in area such as hematology, blood-bank, serology, immunohematology, bacteriology, histology, or chemistry. GOE: 02.04.02 STRENGTH: L GED: R5 M4 L5 SVP: 7 DLU: 88

KNOWLEDGE, EXPERIENCE AND SKILL IN OPERATING MEDICAL TESTING EQUIPMENT AND BE CAPABLE OF MAINTAINING AND CALIBRATING SAME. IN CONJUNCTION WITH THE ABOVE THE OCCUPANT WILL ALSO BE REQUIRED TO REVIEW EXISTING MEDICAL LITERATURE FOR ADVANCES IN DIAGNOSTIC AND TREATMENT METHODS.

(Text as in the original without alteration.) The Hours were 9:00 AM to 6:00 PM at a salary of \$61,796 per year with no overtime. The Employer required eight years of college with a degree in medicine plus three years of experience in the Job Offered. AF 32.

Notice of Findings.⁵ On May 26, 1995, the CO issued a Notice of Findings ("NOF") advising that the application would be denied subject to rebuttal, and indicating the following deficiencies: (1) The CO observed that there did not appear to be a current job opening or on-going business to which U. S. workers could be referred, explaining that the applicable records indicated that the Employer was not conducting any research and development activity at the proposed work site. The CO also found that the Employer failed to advertise the position in the designated newspaper without explaining her failure to comply with 20 CFR §§ 656.21(b)(1) and 656.21(g). AF 27. (2) The application criteria were unduly restrictive in violation of 20 CFR § 656.21(b)(2)(i) (A) in that the education and experience required were a doctoral degree in medicine and three years' experience in "research ... analysis." Citing **Dr. Hunza**, 90 INA 574 (Apr. 1, 1993), and **An, Inc.**, 90 INA 505 (Jan. 19, 1993), the CO further explained that,

It is highly unusual for Medical Technologists to be required to have medical degrees[. They usually have degrees in Medical Technology or associated fields plus specialized training. This requirement appears to be a preference for your convenience and tailored to the alien's background, but not based in business necessity.

The CO added that the Specific Vocational Preparation ("SVP") time assigned to this occupation in the DOT is two to four years,

⁵The Notice of Findings (NOF) must state the specific grounds for denial of certification by identifying the section or subsection violated, the nature of the violation, and the evidence supporting the finding. In addition, it must give instructions for rebutting or curing the violation. If the NOF does not specify what the employer must show to rebut or cure, the employer is deprived of a full opportunity to rebut. **Peter Hsieh**, 88-INA-540 (Nov. 30, 1989); **Downey Orthopedic Medical Group**, 87-INA-674 (Mar. 16, 1988)(en banc). If the NOF is unclear or ambiguous, or causes or contributes to employer's confusion, the application may be remanded to the CO for clarification and to give employer an opportunity to rebut. **Patisserie Suisse, Inc.**, 90-INA-131 (Oct. 16, 1991); **Poultry Classics**, 91-INA-68 (June 21, 1991); **Toys "R" Us**, 89-INA-345 (Dec. 10, 1990) **Sue Chaing**, 89-INA-77 (May 25, 1990); **American Candy Mfg Co.**, 88-INA-274 (Oct. 27, 1989); **Hudson Tool & Die Co.**, 88-INA-145 (Oct. 4, 1989); **Dr. Joseph Maghen**, 88-INA-335 (Aug. 8, 1989).

while Employer's application requires a total of eleven years, consisting of eight years to earn a degree as a Doctor of Medicine and three years of experience as a Medical Technologist. The CO then added that no evidence of record indicated that Employer was engaging in research and development as part of her business. AF 29.

Rebuttal. On her rebuttal of September 11, 1995, Employer did not offer evidence that she was engaging in research and development as part of her business or in any other context. Instead, she indicated that the position was required to provide a service for her own patients on the premises of her medical office under her own "direct supervision." She indicated that she planned to provide better and cheaper medical laboratory services for her patients by having the medical technician's work carried out in this manner. AF 04-05. Concerning her use of a newspaper other than the one designated for the advertisement of the position, the Employer stated that she disagreed with the directions she had been given to advertise the job, citing **Burton Way Motors**, 94 INA 478 (Jul. 20, 1995), and **Montclair Autobody Shop**, 88 INA 224 (Oct. 26, 1988). As to the unduly restrictive job requirements the Employer contended that her objective was to improve and reduce the cost of the laboratory services for her patients. AF 06.

Final Determination. Certification was denied in the CO's Final Determination of January 19, 1996. The CO concluded that the Employer did not sustain her burden of proving that she was conducting "scientific and chemical research" at her clinic, as alleged in her application. Consequently, the Employer failed to establish that an existing permanent, full time position was offered to which U. S. workers can be referred. The CO further concluded that Employer's refusal to publicize the availability of this job by advertising in the publication directed had resulted in an inadequate test of the labor market for this occupation under the Act. The CO observed that by restricting her recruitment efforts the Employer failed to demonstrate that this job is clearly open to any qualified U. S. worker under 20 CFR § 656.20(c)(8), and had failed to comply with the regulations regarding recruitment procedure that were cited in the NOF. Finally, the CO concluded that the Employer failed to establish either that her requirement of a Medical Doctor degree and three years of experience on the Job Offered were not unduly restrictive or that her use of such unduly restrictive hiring requirements was justified by her business necessity, observing, "Your requirements are unduly restrictive and unusual in the occupation." AF 03.

Discussion

On its face this record does not indicate that a job for a Medical Technologist exists in the Employer's medical office. The Employer does not even suggest that she ever hired a Medical Technologist to work in her office in the past. Moreover, the Employer did not offer a description of either the space or any laboratory facilities in that location---now in existence or contemplated in the foreseeable future---that could be used for such a business enterprise, if the Alien or any U. S. worker was hired for such a job by the Employer. As a result, the CO found that the Employer failed to establish the existence of an offer of full time work or a location within the United States to which U. S. workers can be referred for employment.

Consequently, after carefully examining this record we agree that the evidence supports the CO's finding that the Employer failed to demonstrate the existence of a position of employment, as defined in 20 CFR § 656.3. **Artdesign, Inc.**, 89 INA 099 (Dec. 5, 1989); and see also **Gerata Systems America**, 88 INA 344 (Dec. 16, 1988).⁶ Moreover, we further conclude that a discussion of the Employer's restrictive requirements for the job under 20 CFR § 656.21(b)(2) is not necessary, since the Employer failed to establish the threshold fact necessary to a consideration of her application for alien labor certification in this case.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

⁶While we have cited **Artdesign, Inc.**, and **Gerata Systems America**, the Employer does not offer evidence that approaches the level of proof in either case in support of the existence of a position of permanent, full time employment under the Act, as defined in 20 CFR 656.3, as recodified from 20 CFR § 656.50.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

